

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: September 14, 1998

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Weston Paper 530-6067-6067-3400
Case 27-CA-15887 530-6067-6067-5200

This case was submitted for advice as to whether, under Anheuser-Bush,¹ the Employer unlawfully refused to provide the Union with witness statements needed to process grievances.

On April 12, 1998, employee Brown was involved in an altercation with a supervisor, and the Union filed a grievance over the incident. Shortly thereafter, the Employer suspended Brown for three days for challenging the supervisor and for using abusive language. The Union filed a second grievance over Brown's suspension, and also requested "any and all statements taken during the investigation and meeting..." The Employer declined to provide the statements and responded: "You have requested relevant company documents in our files that we deem confidential and proprietary, and our work product in preparation for subsequent grievance proceedings."

The Employer maintains that the requested information consists of witness statements, either in the witness's own handwriting or in transcript form. The Employer's attorney takes the position that Anheuser-Bush privileges the Employer from disclosing the requested witness statements. Although the Employer concedes that the Board requires an employer to identify its witnesses, it argues that witness identity is not an issue in this case because a Union officer was present when the altercation arose.

We conclude that the Employer violated Section 8(a)(5) by failing to supply the requested witness statements.

¹ 237 NLRB 982 (1978).

We initially conclude that this case should be analyzed by applying the Supreme Court's decision in Detroit Edison² rather than the Board's rationale in Anheuser-Busch.³ In Ormet Aluminum Mill Products Corp.,⁴ the General Counsel urged the Board to abandon the Anheuser-Busch per se approach to prearbitration disclosure of witness statements, and instead to apply the Detroit Edison balancing test that the Board applies to all other categories of alleged confidential information.

Applying a Detroit Edison analysis to the instant case, we note initially that the witness statements requested by the Union are relevant, a fact apparently conceded by the Employer. We conclude that the Employer has not offered any legitimate and substantial business justification for failing to turn over these witness statements. The Employer has offered only its bare assertions, neither corroborated nor explained, that the statements are "confidential and proprietary, and our work product..." Bare assertions, standing alone, are insufficient to establish a legitimate and substantial business justification for not turning over relevant information.

Finally, even assuming, arguendo, that the Employer had established a reasonable and substantial business justification, it has not bargained with the Union about a reasonable, good faith accommodation in lieu of providing the actual witness statements. The Employer simply denied

² Detroit Edison v. NLRB, 440 U.S. 301 (1979).

³ We also note that the Union's request for information did not fairly encompass a request for witness names. Therefore, the Region should not argue that the Employer is required to furnish the witness's names with an oral summary of their statements. Cf. Boyertown Packaging Corp., 303 NLRB 441, 444 (1991) ("an employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined.").

⁴ Case 8-CA-29061, Advice Memorandum dated September 5, 1997.

the Union's request for the witness statements without bargaining. Therefore, the Employer did not meet its obligations under Detroit Edison.

B.J.K.